

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Donald S. Owens, P.J., David H. Sawyer and Jessica R. Cooper, J.J.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v

FRED GOTTSCHALK AND JEFFREY SILAGY,

Defendants-Appellees.

Supreme Court Nos.
121833 and 121834

Court of Appeals Nos.
237681 and 237682

Iosco Circuit Court Nos.
01-4203-FH & 01-4204-FH

**BRIEF OF ATTORNEY GENERAL AND PROSECUTING
ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICI CURIAE**

ORAL ARGUMENT REQUESTED

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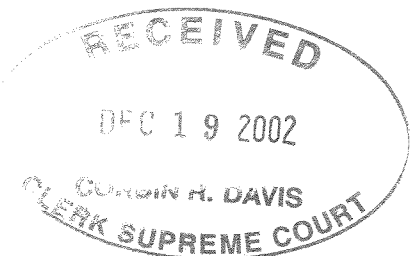


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QUESTION PRESENTED FOR REVIEW

- I. Is the appointment of a special prosecutor pursuant to MCL 49.160 valid where the appointment is made while no charges are pending against defendant?**

STATEMENT OF PROCEEDINGS AND FACTS

Amici Curiae adopts the statement of facts of Defendants-Appellees, Fred Gottschalk and Jeff Silagy.

ARGUMENT

I. Amici Curiae urge this court to invalidate the appointment of Special Prosecutor Maureen Holohan as being contrary to statute and in violation of the doctrine of separation of powers.

A. Standard of Review

Amici Curiae raise questions of statutory interpretation which are questions of law. This Court reviews such questions of law *de novo*. *Crowe v City of Detroit*, 465 Mich 1; 631 NW2d 293 (2001).

B. Recent legislation has eliminated any precedential impact of this case.

On December 10, 2002, the House passed Senate Bill 115, which significantly amends the special prosecutor statute at issue in this case. It is expected that the Governor will sign this bill into law before the end of the year. Enrolled Senate Bill 115, as amended, amends MCL 49.160 to eliminate any judicial participation in the special prosecutor procedure. A copy of SB 115 is attached hereto. Under the new law, a prosecutor shall petition the Attorney General who will then appoint as special prosecutor, a prosecutor or assistant prosecutor from another county. Under the revised law, the special prosecutor is specifically empowered to conduct an investigation and initiate criminal charges. Inasmuch as this Court's ruling will have no precedential impact beyond the instant case, it may wish to reconsider its decision granting leave to appeal.

C. Analysis

1. Introduction and Overview.

On March 2, 2000, Maureen Holohan was appointed by the circuit court as a special prosecuting attorney pursuant to MCL 776.18. The order authorizing the appointment states that her duties include reviewing the incident report filed by the Michigan State Police and to “mak[e] a determination whether a warrant should be issued and to serve during the pendency of

that case only.” The appointment was clearly an error since MCL 776.18 allows only the prosecuting attorney to appoint an assistant prosecutor. MCL 776.18 does not allow a member of the judiciary to appoint a special prosecuting attorney. Recognizing the appointment to be in error, on November 24, 2000, the court revised the previous order stating that the “intent of the order was to appoint Ms. Holohan under MCL 49.160.” Recasting the order pursuant to MCL 49.160 was also an error.

Since Ms. Holohan is a special prosecuting attorney, she is bound by the restrictions set forth in MCL 49.160. The statute precludes a special prosecutor from investigating or authorizing a complaint without the approval of the Attorney General or the county prosecutor.

2. A Brief History of the Special Prosecutor Statute.

For over a century, Michigan courts have continuously held that a special prosecutor may not investigate potential criminal activity and initiate a prosecution. The first case to interpret a special prosecutor’s power was *Sayles v Circuit Judge of Genesee County*, 82 Mich 84; 46 NW 29 (1890), which held that an earlier statute, virtually identical to MCL 49.160, did not allow the appointment of a special prosecutor in a case like this. The Court in *Sayles* interpreted the statute to allow a special prosecutor to only act in “cases *arising in or pending in those courts*, and not to cases *out of such courts*.” *Sayles*, 82 Mich at 89. [Emphasis added.] The court went on to state:

But the circuit court judge cannot appoint a special prosecuting attorney to investigate a charge of crime, or to conduct an examination before a justice of the peace. The circuit judge is a conservator of the peace, but that does not authorize him to appoint any one to act as public prosecutor, except in his own court, in cases over which he has jurisdiction. Even then his power is statutory. [82 Mich at 90]

The principle established in *Sayles, supra*, was followed in *People v Davis*, 86 Mich App 514; 272 NW2d 707 (1978). There, the elected county prosecutor perceived a conflict of interest

and petitioned the circuit court to appoint a special prosecutor to investigate alleged corruption within the office of the sheriff. The court relied on *Sayles* and concluded that the circuit court lacked the jurisdiction to appoint a special prosecutor for the purpose of investigating a case and initiating prosecution. 86 Mich App at 520-522.

Again, in *In re Petition for Appointment of Special Prosecutor*, 122 Mich App 632; 332 NW2d 550 (1983), the Court of Appeals examined whether a special prosecutor may authorize a criminal complaint. The case dealt with alleged improprieties by Saginaw police officers while executing a search warrant. Even though MCL 49.160 had been amended since *Sayles*, the court still reached the conclusion that a special prosecutor could not initiate a criminal case, stating in pertinent part:

If the amended statute were interpreted as allowing the appointment of a special prosecutor to initiate criminal charges, even for legitimate reasons such as *conflict of interest*, the court's appointment of a special prosecutor would constitute a judicial second-guessing of the prosecutor's actions. Because such an action by the courts is suspect under constitutional principles, we hesitate to make such an interpretation of this statute, since the statute does not explicitly provide for that kind of judicial power. *Once a case is brought to court, the substitution of a special prosecutor does not constitute such an obvious interference with prosecutorial discretion.*

* * *

The recommended remedy herein is for petitioners to request the Attorney General to review their complaint and rule on same pursuant to the authority granted under MCL 14.28; MSA 3.181 and MCL 14.30; MSA 3.183.
[Emphasis added.] [122 Mich App at 636-637]

Most recently, in *People v Herrick*, 216 Mich App 594, 601, fn 3; 550 NW2d 541 (1996), the court again concluded that "a special prosecutor could not be appointed to investigate or initiate a criminal charge."

Plaintiff-Appellant would distinguish the cited precedent on the basis that the statute relied upon in *Sayles* has since been amended or that in some cases the prosecutor did not

petition for the appointment of the special prosecutor. With regard to the former argument, Amici Curiae submit that the amendments have been cosmetic rather than substantive. In fact, the court in *Davis, supra*, even went so far as to find the current statute to be "identical" to that in *Sayles*. 86 Mich App 520, 522. Similarly, the court in *In Re Petition for Appointment of Special Prosecutor, supra*, found the amendments to be insignificant, concluding that the current statute, as its predecessor, does "not allow a circuit court to appoint a special prosecutor to perform the duties of the prosecuting attorneys in any matters outside of the aforementioned courts, including the investigation of complaints of a crime or for the purpose of initiating criminal charges." 122 Mich App at 635-636.

Alternatively, Plaintiff-Appellant claims, when convenient, that the prior cases do not involve situations where the county prosecutor requested the special prosecutor. To the contrary, the courts in both *Sayles* and *Davis* were acting at the express behest of the county prosecutor.¹

The special prosecutor in this case is subject to the restrictions imposed by MCL 49.160, which include the inability to initiate an investigation and authorize criminal charges. These restrictions are based on statutory interpretation and on the principle of the separation powers between the separate branches of government.

While a court may appoint a special prosecutor to act in a pending case, in the event of the disqualification of the prosecutor and his staff, the special prosecutor lacks the authority to initiate a case. Michigan simply does not have the type of special prosecutor statute that allows for the appointment of an "independent counsel" to investigate and initiate criminal

¹ The special prosecutor also seeks to draw a distinction on the basis that in *Sayles*, the circuit judge appointed the prosecutor to act in a justice of the peace court, which, of course, no longer exists. At some point it must be conceded that distinctions exist. Clearly, however, for the purpose of any legal analysis, the alleged distinctions make no difference.

prosecutions.² In fact, even the federal independent counsel statute was not renewed because of the problems associated with this authority.³

Only an elected official responsible to the people in the county or the state can decide whether to approve criminal charges. Since this case had not been reviewed and approved by the Attorney General or the locally elected prosecutor, it lacked the approval of a public official responsible to the people. As such, it should have been dismissed.

3. Specific Statutory Remedies Provide an Alternative to the Appointment of a Special Prosecutor.

The Attorney General may intervene in any case “when in his own judgment the interest of the state require it,” (MCL 14.28) or “whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state,” (MCL 14.101).

The authority of the Attorney General to intervene should only be denied where there is a showing that “such intervention is clearly inimical to the public interest.” *People v Johnston, In Re Intervention of Attorney General*, 326 Mich 213, 217; 40 NW2d 124 (1949).

The Attorney General exercised her right to intervene in this case for several reasons. Ms. Holohan did not have the statutory authority to authorize charges as a special prosecutor.

² See Herbert J. Miller, Jr. & John P. Elwood, *The Independent Counsel Statute: An Idea Whose Time Has Passed*, 62 Law & Contemp Prob 11. One of the criticisms lodged against the independent counsel act was that the lack of accountability led voters to be unsure as to who is responsible for problems that arose during the appointment. The authors state that the effect of this was “that the independent counsel [could] run amok with impunity, severely disrupting the lives of the targets and witnesses who come within the scope of the investigation . . .”

³ See Pub L No 103-270, 2, 108 Stat 732, 732 (1994) The Ethics in Government Act, which is the legislation that created the Independent Counsel, was amended to include a 5-year renewal procedure which was not exercised by Congress in 1999, and Abraham Dash, *Symposium: The Office of Independent Counsel and the Fatal Flaw: “They Are Left to Twist in the Wind”*, 60 Md L Rev 26. The investigation of President Clinton concerning the politically embroiled “Whitewater” scandal cost over \$150 million dollars. This commentator noted that the statute was criticized because it was an overused political tool.

Ms. Holohan lacked the necessary experience to prosecute a criminal case, having never before participated in a criminal case, as either a defense attorney or prosecutor. Furthermore, the case had not been properly investigated by any police agency. Finally, the dismissal of a prior civil suit raised essentially the same issues as in this case. See: *Freund v Silagy, et al*, Court of Appeals No. 228974, unpublished (May 14, 2002). Nonetheless, in its “order and opinion” of November 14, 2000, the district court denied the Attorney General’s motion to intervene and assume jurisdiction. The Attorney General asked the court to appoint an elected, constitutional officer, to investigate the matter and was denied. Allowing the appointment of an elected county prosecutor would have been the necessary check on the judiciary’s interference of an executive function. Clearly, the protection of constitutional safeguards is in the interest of the public.

If the lower court believed that a prosecutor other than the elected county prosecutor or Attorney General was required, it could have availed itself of the authority to conduct an examination by a circuit judge under Michigan’s one-person grand jury statute. MCL 767.3 provides that:

Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint

The initiation of the investigation may be commenced by any person and does not have to involve the prosecuting attorney of the county or the attorney general. *In re Petition for Investigation into Conduct of Recount and Investigation of November, 1934, Election in Wayne County*, 270 Mich 328; 258 NW 776 (1935). In fact, the circuit judge in the county where the court is presiding may appoint another circuit judge to conduct the investigation. *Id.*

The one-person grand jury would have been an alternative to the appointment of a special prosecutor where there is an actual or perceived conflict of interest in the offices of the prosecuting attorney and the Attorney General. In this case, Mr. Freund, the alleged victim in this case, could have petitioned the circuit court judge to conduct an investigation. This process avoids the judicial “second guessing” inherent in the appointment of a special prosecutor.⁴

The problems associated with the appointment of Special Prosecutor Holohan could also have been avoided by impaneling a citizen’s grand jury under MCL 767.1. The legislature created the citizen's grand jury process as an alternative charging mechanism. See *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001). Under the statute the judge may convene a grand jury whenever he or she deems it necessary. See *People v Reigel*, 120 Mich 78; 78 NW 1017 (1899).

In this case, the grand jury could have investigated and determined if there was sufficient evidence to cause defendants to stand trial. Therefore, the grand jury, not a special prosecutor, would have decided whether the charges warranted an indictment. This would have avoided the statutory and constitutional problems that arose when the special prosecutor conducted the investigation and initiated the criminal prosecution.

⁴ The judge under the statute functions under his or her judicial capacity and therefore the investigation is permissible under the state constitution. See *Kloka v Brake*, 318 Mich 87; 27 NW2d 507 (1947); *In re Slattery*, 310 Mich 458; 17 NW2d 251 (1945).

CONCLUSION

The reality of the prosecutor's office is that at times its members are confronted with a conflict of interest. However, the judicial branch cannot remedy this disqualification by appointing a special prosecutor pursuant to MCL 49.160. Appointments accomplished through MCL 49.160 are valid only where there are charges currently pending against a defendant. A special prosecutor does not have the authority to initiate an investigation and authorize criminal charges.

When a situation occurs such as the present case, the Legislature has provided alternatives to an appointment of a special prosecutor. One approach is to allow the Attorney General to intervene and assume prosecutorial jurisdiction. Furthermore, the complainant could petition the circuit court to either conduct a one-person grand jury or empanel a citizen's grand jury.

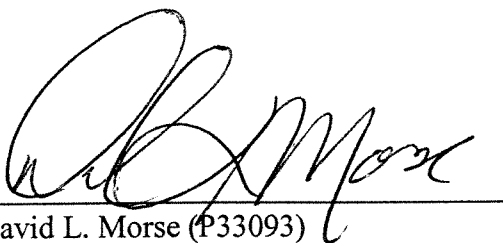
RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Amici Curiae, in support of Jeffrey Silagy and Fred Gottschalk, Defendants-Appellees, respectfully requests that this Honorable Court affirm the decision of the Court of Appeals.

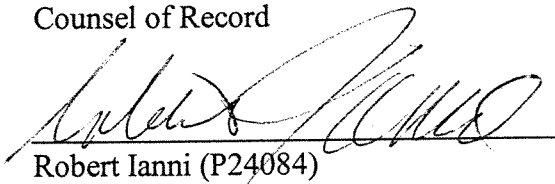
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Dated: December 18, 2002

Senate Bill 115

A bill to amend 1846 RS 14, entitled
"Of county officers,"
by amending section 60 (MCL 49.160).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 60. (1) If the prosecuting attorney of a county ~~is~~
2 DETERMINES HIMSELF OR HERSELF TO BE disqualified by reason of
3 conflict of interest or is otherwise unable to attend to the
4 duties of the office, ~~the supreme court, the court of appeals or~~
5 ~~the circuit court for that county, upon a finding to that effect~~
6 ~~by the court, may appoint an attorney at law as~~ HE OR SHE SHALL
7 FILE WITH THE ATTORNEY GENERAL A PETITION STATING THE CONFLICT OR
8 THE REASON HE OR SHE IS UNABLE TO SERVE AND REQUESTING THE
9 APPOINTMENT OF a special prosecuting attorney to perform the

SB0115, As Passed House, December 10, 2002

10 duties of the prosecuting attorney ~~in the respective court~~ in
01634'01 KDD

SB0115, As Passed House, December 10, 2002

SB 115 as amended December 10, 2002 2

1 any matter in which the prosecuting attorney is disqualified or
2 until ~~such time as~~ the prosecuting attorney is able to serve.

3 (2) If the ~~prosecuting attorney of a county is disqualified~~
4 ~~by reason of conflict of interest or is otherwise unable to~~
5 ~~attend to the duties of the office, the circuit court for that~~
6 ~~county, upon a finding to that effect by the court, may appoint~~
7 ~~an attorney at law~~ ATTORNEY GENERAL DETERMINES THAT A PROSECUT-
8 ING ATTORNEY IS DISQUALIFIED OR OTHERWISE UNABLE TO SERVE, THE
9 ATTORNEY GENERAL MAY ELECT TO PROCEED IN THE MATTER OR MAY
10 APPOINT A PROSECUTING ATTORNEY OR ASSISTANT PROSECUTING ATTORNEY
11 WHO CONSENTS TO THE APPOINTMENT TO ACT as a special prosecuting
12 attorney to perform the duties of the prosecuting attorney ~~in~~
13 ~~the probate court, the district court, or any other court within~~
14 ~~the county~~ in any matter in which the prosecuting attorney is
15 disqualified or until ~~such time as~~ the prosecuting attorney is
16 able to serve.

17 (3) A special prosecuting attorney appointed under this sec-
18 tion is vested with all of the powers of the prosecuting attorney
19 for the purpose of the appointment and during the period of
20 appointment[, INCLUDING THE POWER TO INVESTIGATE AND INITIATE CHARGES].
THE COST OF PROSECUTION, OTHER THAN PERSONNEL
21 COSTS, IN ANY MATTER HANDLED BY A SPECIAL PROSECUTING ATTORNEY
22 SHALL BE BORNE BY THE OFFICE OF THE PROSECUTING ATTORNEY WHO HAS
23 BEEN DETERMINED TO BE DISQUALIFIED OR OTHERWISE UNABLE TO SERVE.
24 [

25
26
27

]

SB0115, As Passed House, December 10, 2002

SB 115 as amended December 10, 2002

3

1 (4) This section ~~shall~~ DOES not apply if an assistant
2 prosecuting attorney has been or can be appointed by the prose-
3 cuting attorney pursuant to section 18 of chapter 16 of ~~Act~~
4 ~~No. 175 of the Public Acts of 1927, being section 776.18 of the~~
5 ~~Michigan Compiled Laws~~ THE CODE OF CRIMINAL PROCEDURE, 1927 PA
6 175, MCL 776.18, to perform the necessary duties within the con-
7 straints of that section or if an assistant prosecuting attorney
8 has been otherwise appointed by the prosecuting attorney pursuant
9 to law and is not disqualified from acting in place of the prose-
10 cuting attorney.

[Enacting section 1. This amendatory act takes effect February 1,
2003.]